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PP v. SHARIL MOHD SARIF

HIGH COURT MALAYA, KUALA LUMPUR
MUNIANDY KANNYAPPAN J
[CRIMINAL APPEAL NO: WA-42CY-5-10-2023]
19 DECEMBER 2024

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Abstract – *To establish an offence under s. 233(1)(a) of the Communications and Multimedia Act 1998, ie, posting offensive comments, the prosecution must prove mens rea, specifically that the accused intended to injure the feelings of others. A lack of awareness of the nature and consequences of the act due to mental instability negates the element of mens rea. Proof of actus reus alone, ie, the act of posting alone, is insufficient to establish a prima facie case without proof of mens rea.*

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CYBER LAW: *Improper use of network facilities – Communications and Multimedia Act 1998, s. 233(1)(a) – Accused charged for posting on Twitter application offensive comment directed at individuals which had effect of annoyance and insult – Whether elements of charge established – Whether accused had used Twitter application to upload communication – Whether communication offensive – Whether communication uploaded with intent to injure feelings of others – Whether actus reus and mens rea established*

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CRIMINAL LAW: *Defences – Legal insanity – Accused charged for posting on Twitter application offensive comment directed at individuals which had effect of annoyance and insult – Accused pleaded defence of insanity during act of posting – Whether defence available to accused – Whether accused mentally unstable and not aware at all that what he did was contrary to law – Whether mens rea established – Penal Code, s. 84 – Communications and Multimedia Act 1998, s. 233(1)(a)*

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G ***CRIMINAL PROCEDURE:*** *Appeal – Appeal by prosecution – Acquittal and discharge – Accused charged for posting on Twitter application offensive comment directed at individuals which had effect of annoyance and insult – Whether elements of charge established – Whether accused had used Twitter application to upload communication – Whether communication offensive – Whether communication uploaded with intent to injure feelings of others – Whether actus reus and mens rea established*

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The accused was charged at the Sessions Court for an offence of posting on his Twitter application an offensive comment directed at individuals, which had the effect of annoyance and insult, an offence pursuant to s. 233(1)(a) of the Communications and Multimedia Act 1998 ('Act'). The accused, who was unrepresented, pleaded guilty but submitted that he was unwell and mentally unstable when he posted the comments. The Sessions Court Judge

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('SCJ') ordered for the accused to be placed under observation at the psychiatric hospital for diagnosis. Subsequent to that, after observation and treatment by a specialist psychiatrist ('SP3'), a psychiatric forensic report ('P4B') was issued certifying that the accused was of sound mind and capable of making his defence. The trial then progressed and the case of prosecution commenced and completed. In his submission at the close of the prosecution's case, the accused informed the court without any reservation that at the material time, when he posted the alleged communication on his Twitter application, he was mentally unstable and not aware at all that what he did was contrary to the law. The SCJ ordered an acquittal and discharge of the accused. Hence, the present appeal by the prosecution.

Held (dismissing appeal; affirming order of acquittal and discharge):

(1) Fortifying the position of the accused was the fact that the prosecution, in its own case, had called SP3, who had examined the accused, evaluated his mental condition and had prepared P4B, stating that the accused had been suffering from schizophrenia and, at the time of the posting of the comments on his Twitter application, his mental state was unstable and he was not aware of the nature and consequences of his act of posting and that it was contrary to the prevailing law. When he was taken in for observation by SP3, he was living with his mental ailment without proper and adequate treatment. As such, he displayed incoherence in his conduct and speech. However, whilst under the observation and treatment by SP3, he was given proper care and adequate treatment by taking the necessary medication to which he was not accessible to earlier. By that mode and manner, his mental condition was said to have improved by SP3 and the accused had displayed coherence when he spoke. It was on that plane that SP3 had opined in P4B that the accused was fit to stand trial and defend himself to the charge and prove his innocence. Pursuant to that, the SCJ had correctly continued to try the case of the accused, with the commencement of the prosecution's case till its completion. At the end of the prosecution's case, the accused was able to advance the defence of legal insanity, as contained in s. 84 of the Penal Code ('PC'), and he was able to refute the preferred charges for offences he was alleged to have committed. His explanation synced with the testimony of SP3. (paras 5 & 6)

(2) The specie of insanity addressed by s. 84 of the PC is one of legal insanity that at the time of commission of offence, the cognitive faculties of the accused were impaired. It was to the extent the accused was incapable of knowing the nature of his act or that what he did was wrong or contrary to law. P4B prepared by SP3, after having observed the accused at the mental hospital, which spoke of medical insanity, also synced with the law as found in s. 84 of the PC. The *mens rea* of the accused was also negated by P4B which showed that when the accused

posted the comments as he stood charged, he was unaware of its consequences and that it offended the prevailing law. That *per se* dislodged the case of prosecution. In the absence of proof of *mens rea*, a *prima facie* case was not made out or proven by the prosecution against the accused, pursuant to s. 173(h)(iii) of the Criminal Procedure Code ('CPC'). Regardless of the mental condition of the accused, as outlined by P4B, the prosecution was also unable to prove the mental element required for commission of the offence of posting offensive comments in his Twitter application, pursuant to s. 233(1)(a) of the Act that, at the time of posting, his intent was to injure the feelings of others who had access to the comments or read it. In the absence of proof of *mens rea*, proof as to the posting only, *ie*, *actus reus* of the offence, was insufficient to establish a *prima facie* case against the accused. (paras 7-9 & 11)

(3) There were no apparent or compelling reasons to interfere with the findings arrived at and the decision made by the SCJ as it was in accord with the circumstance of the case involving the accused and it synced with the law applicable. Thus, it was not plainly wrong. As such, the order of acquittal and discharge of the accused was affirmed and the appeal by the prosecution was dismissed. (paras 14 & 15)

Case(s) referred to:
Bhikari AIR 1966 SC 1 ***(refd)***
John Nyumbei v. PP [2007] 2 CLJ 509 CA ***(refd)***
Ling Tee Huah v. PP [1980] CLJU 212; [1980] 1 LNS 212 ***(refd)***
Ong Eng Guan v. PP [1955] CLJU 82; [1955] 1 LNS 82 HC ***(refd)***

Legislation referred to:
Communications and Multimedia Act 1998, s. 233(1)(a)
Criminal Procedure Code, ss. 173(f)(ii), (h)(iii), 307(1), 342(3), 343(1)
Penal Code, s. 84

Other source(s) referred to:
Ratanlal & Dhirajlal, *Law of Crimes, A Commentary on Indian Penal Code,* 1860, 29th edn, p 394

For the prosecution/appellant - Zaileen Nadia Zubir; DPP
For the respondent/accused - Pang Tek Kit; M/s TK Pang

Reported by Najib Tamby

JUDGMENT

Muniandy Kannyappan J:

[1] The appeal in the present case is by the prosecution against the order of acquittal and discharge of the accused by the Sessions Court Judge (SCJ).

[2] The accused was charged for an offence of posting on his Twitter application an offensive comment directed at individuals which had the effect of annoyance and insult. The content of the charge is not reproduced, as the comments made are as stated by the SCJ "dipadam kerana perkataan lucah

dan menghina Raja dan agama". However, it could be found in the record of appeal. It is an offence pursuant to s. 233(1)(a) of the Communications and Multimedia Act 1998 (Act 588). The provision (as applicable in the official text language) renders the following:

> (1) Seseorang yang –
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> (a) Dengan menggunakan perkhidmatan aplikasi secara sedar –
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> (i) Membuat dan
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> (ii) Memulakan penghantaran,
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> komunikasi yang jelik sifatnya dengan niat untuk menyakitkan hati orang lain;

The ingredients of the offence which has to be proved by the prosecution beyond reasonable doubt are:

(i) the accused had used his Twitter application to upload a communication;

(ii) the said communication is offensive;

(iii) the communication was uploaded with an intent to injure the feelings of others.

The pivotal issue, therefore, is not whether the communication made by the accused has caused annoyance but whether he intended to annoy the feelings of others. (See *Ong Eng Guan v. PP* [1955] CLJU 82; [1955] 1 LNS 82; [1956] 1 MLJ 44). But of course, evidence as to the intention of the accused by posting such comments on his Twitter application need not be direct but could be contained by way of inferential evidence pointing to the fact that the accused was not only aware of the communication uplifted on to his Twitter application, but that by doing so, he at the material time had the intention to annoy others. The SCJ had correctly in law directed her mind to this salient fact in issue, which are material ingredients to be proven by the prosecution *vide* credible evidence.

[3] At the outset, in the present case, the accused had pleaded guilty, but he qualified it by saying that he was unwell and mentally unstable when he posted the comments. As such, and rightly, the SCJ had ordered for the accused to be placed under observation at the psychiatric hospital for diagnosis pursuant to s. 342(3) of the Criminal Procedure Code (CPC/Act 593). Subsequent to that, after observation and treatment afforded by SP3, he had issued his report P4B, pursuant to s. 343(1) of the CPC certifying that the accused person is of sound mind and capable of making his defence, and the SCJ shall proceed with the trial of the case of the accused.

[4] The trial then progressed and the case of prosecution had commenced and completed. The accused was without legal representation and after having heard the testimony of all the prosecution witnesses who had testified

against him, had chosen not to cross-examine them. But in his submission at the close of the case of prosecution, he had informed the court without any reservation, that at the material time when he posted the alleged communication in his Twitter application, he was mentally unstable and not aware at all that what he did was contrary to the law. In law, it is not an afterthought explanation or a recent invention by him to exonerate himself from criminal liability but a defence available to him pursuant to s. 84 of the Penal Code (PC/Act 574), which renders legal insanity as a total defence for criminal liability in the following terms:

> 84. Act of a person of unsound mind
>
> Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

I say it is a legitimate defence available to him, and not plucked from thin air, but also supported by the evaluation on him made by SP3 of his mental condition at the material time when the posting was made on the Twitter application.

[5] Fortifying the position of the accused, is the fact that the prosecution in its own case had called the specialist psychiatrist SP3 who had examined the accused, evaluated his mental condition and had prepared a psychiatric forensic report P4B stating that the accused has been suffering from schizophrenia and at the time of posting of the comments on his Twitter application, his mental state was unstable and he was not aware of the nature and consequence of his act of posting and that it was contrary to the prevailing law. When he was taken in for observation by SP3, he was living with his mental ailment without proper and adequate treatment. As such, he displayed incoherence in his conduct and speech. But, whilst under observation and treatment by SP3, he was given proper care and adequate treatment by taking the necessary medication to which he was not able to access earlier. By that mode and manner, his mental condition is said to have improved by SP3 and the accused had displayed coherence when he speaks. It was on that plane, SP3 had opined in his report P4B that the accused is fit to stand trial and defend himself to the charge and prove his innocence. Pursuant to that, correctly, the SCJ had continued to try the case of the accused, with the commencement of the case of the prosecution, till its completion.

[6] At the end of the case of the prosecution, the accused was able to advance the defence of legal insanity as contained in s. 84 of the PC, and he was able to refute the preferred charges for offences he is alleged to have committed. His explanation syncs with the testimony of SP3.

[7] The specie of insanity addressed by s. 84 of the PC is one of legal insanity, that at the time of the commission of the offence, the cognitive faculties of the accused were impaired. It was to the extent the accused was incapable of knowing the nature of his act, or that what he did was wrong or contrary to law. The report prepared by SP3 after having observed the accused person at the mental hospital, which speaks of medical insanity, also syncs with the law as found in s. 84 of the PC.

[8] Since the offence alleged to have been committed by the accused is not one of strict liability, it is for the prosecution to prove beyond reasonable doubt that the accused, when posting the comments on his Twitter application had the intention to injure others. Essentially, that would be the *mens rea*, of the accused that has to be proven, which in this case at the end of the case of prosecution remained not proved, even inferentially. His *mens rea* is also negated by the medical insanity report P4B prepared by SP3, showing that when the accused posted the comments as he stood charged, he was unaware of its consequences and that it offends the prevailing law. That *per se* dislodges the case of prosecution. (See the case of *PP v. Ling Tee Huah* [1980] CLJU 212; [1980] 1 LNS 212; [1982] 2 MLJ 324).

[9] In the absence of proof of *mens rea*, a *prima facie* case is not made out or proven by the prosecution against the accused pursuant to s. 173(h)(iii) of the CPC which reads – a *prima facie* case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction, and pursuant to s. 173(f)(ii) of the CPC, if the court finds that the prosecution has not made out a *prima facie* case against the accused, the court shall record an order of acquittal, which is exactly so in the present case.

[10] The SCJ when arriving at the said finding had evaluated the evidence tendered by the prosecution on a maximum evaluation basis. It was arrived at premised on the evidence tendered by the prosecution, which is wanting in proof that the accused had done it with the intent to injure the feelings of others. The psychiatric forensic medical report P4B tendered by the prosecution during the case of prosecution, clearly shows that the accused was "dalam keadaan mental yang tidak waras dan tidak sedar akan sifat dan akibat daripada perbuatannya serta tidak mampu untuk mengetahui bahawa perbuatan tersebut adalah salah dan bertentangan dari segi undang-undang." This was also iterated by the accused in his explanation at the close of the case of prosecution.

[11] The finding made by the SCJ is not out of thin air but in accord with the prevailing law as decided by the Court of Appeal in the case of *John Nyumbei v. PP* [2007] 2 CLJ 509 in the following terms:

A Thus, under s. 84 Penal Code, criminality has to be determined according to that legal test and not merely by the mental state of an accused person according to the medical test. There is a distinction between the notion of a legal insanity and medical insanity. Not every form of insanity exempts a person from criminal responsibility. Only legal insanity provides that exemption under s. 84 Penal Code. The specie of insanity addressed
B by s. 84 is the one that impairs the cognitive faculties of a person. Its nature and extent must be that to make the offender incapable of knowing the nature of his act, or that he is doing is wrong or contrary to law. The criminality of an act therefore must be determined by this test laid down in s. 84 as distinguished from the medical test (see *Ratanlal and Dhirajlal's Law of Crime* (25th edn.) p. 280).

C When the defence of insanity is raised the court needs to consider two matters, namely:

(i) whether the accused person has successfully established, as a preliminary issue, that at the time of committing the act he was of unsound mind, and
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(ii) if he was of unsound mind, whether he has proven that his unsoundness of mind was of a degree to satisfy one of the tests earlier mentioned *ie*, that the accused was incapable of knowing the nature of his act as being wrong or against the law.

E In the present case, to reiterate, the accused was unrepresented. He had made attempts to plead guilty but the SCJ rightly refused to accept the plea of guilty as it was qualified, as when pleading guilty, he had stated that he was "tidak waras semasa kejadian". What is material in the present case is that, regardless of the mental condition of the accused as outlined by the report
F P4B, the prosecution was also unable to prove the mental element required for commission of the offence of posting offensive comments in his Twitter application pursuant to s. 233(1)(a) of Act 588, that at the time of posting, his intent was to injure the feelings of others who have access to the comments or read it. In the absence of proof of *mens rea*, proof as to the posting only, *ie*, *actus reus* of the offence is insufficient to establish a *prima*
G *facie* case against the accused. Uniquely, it was the prosecution on its volition tendered the psychiatric report to show that the accused was "tidak waras dan tidak sedar akan sifat dan akibat daripada perbuatannya dan tidak mampu untuk mengetahui bahawa perbuatan tersebut adalah salah dan bertentangan dari segi undang-undang". That, although amounts to medical insanity but it
H too fulfils the test of legal insanity as required under s. 84 of the PC, as explained by the accused at the close of the case of prosecution, thus exonerating himself from criminal liability on the charges preferred against him for the offences committed.

I **[12]** The progress of case of the accused before the SCJ has to be acclaimed, as it is in accordance with the law applicable as discerned from the following case authorities. It being:

(i) In the case of *PP v. Dat ak Tuni* [1991] 1 MLJ 208, Haidar J pointed out that s. 343(1) of the CPC clearly specifies that if a medical superintendent certifies that the accused is of sound mind and capable of making his defence, the judge should have proceeded with the trial. A

(In the present case, the SCJ did so). B

(ii) In *PP v. Zainal Abidin bin Mohd Zaid* [1993] 1 CLJ 147, Shankar J took the approach that if the accused was of sufficiently sound mind to claim trial, he should likewise be able to admit the facts alleged against him, by the prosecution. It was then open to the defence to raise the defence of insanity and rely upon the medical testimony before the court. His Lordship felt that the magistrate was entitled to proceed as he did as he was the sole fact finder and the prosecution had not protested. C

(The trial before the SCJ progressed on that plane).

(iii) In the case of *PP v. Chiah En Boon* (Unreported, Supreme Court 1989), the accused found by the hospital authorities to have suffered from schizophrenia at the time of commission of the offence and by reason of unsoundness of mind, he was incapable of knowing the outcome of the act or that it was wrong or contrary to law. The accused pleaded guilty and admitted the facts of the case. The High Court refused to accept the plea of guilty and without conducting a trial, proceeded to record a finding that it was satisfied that the accused had committed the act but by reason of unsoundness of mind he was incapable of knowing the nature of the act alleged as constituting the offence or that it was wrong or contrary to law. The court ordered the accused to be detained at the pleasure of the Ruler under s. 348(1) of the CPC. On appeal by the prosecution, the then Supreme Court ordered that the case be remitted back to the High Court Judge to hold a trial, if the court was satisfied that the accused was fit to plead. D E F

(In the present case, the SCJ was correct in not accepting the plea of guilty by the accused in view of the qualified plea by the accused, she progressed with the trial of the accused and found him not guilty at the end of the case of prosecution). G

(iv) In the case of *PP v. Nageswari* [1994] 3 MLJ 463, it was the decision of the court that when the magistrate accepted the plea of guilty by the accused when he knew well the adverse report from the mental hospital, he had in effect undermined the established principles in criminal law, namely, on a plea of guilty, the accused must be convicted and sentenced accordingly. Since the magistrate acknowledged the medical report, then by virtue of s. 347 of the CPC, the judgment of the magistrate should have been one of acquittal on the ground of mental disorder. The magistrate should also make a finding as to whether the accused committed the act or not. An order of acquittal on the ground of mental disorder should be made after a full-fledged trial and no short cut is allowed. H I

(In the present case, the SCJ went ahead to try the accused person by hearing witnesses and decided to acquit the accused at the end of the case of prosecution, as the mens rea of the offence was not proven by the prosecution, also in sync with the mental condition of the accused as elaborated by the psychiatrist in his report P4B).

(v) In the case of *PP v. Misbah bin Saat* [1997] 3 MLJ 495, it was decided that it is not for the court to consider the mental state of the accused at the time of the commission of the offence if the defence of insanity is not raised by the accused. The court's responsibility is only to ensure that the accused is fit to stand trial. For this purpose, the medical report is relevant to assist the court in this finding, as to whether the accused wishes to raise insanity as a defence is the sole prerogative of the accused. It was also decided that s. 347 of the CPC is meant to apply to cases where the defence of insanity had successfully been raised by the accused.

(In the present case, the SCJ had prudently sent the accused for observation at the mental hospital, after which the report P4B came about, which had assisted the court to arrive at a finding at the end of the case of prosecution).

(vi) In the case of *PP v. Ismail bin Ibrahim* [1998] 2 CLJ 213, it was decided that to accept a plea of guilty by a person who could have succeeded on a plea of insanity was wrong in law as the plea would not amount to an offence due to the absence of *mens rea*.

(This is exactly the case of the accused before the SCJ).

(vii) In the latest Federal Court case of *PP v. Mohd Rozani bin Yahaya* (MPRJ No: 05(LB)-117-11-2023(D)), the primary issue decided was whether, in light of the defence of insanity raised by the accused, the trial judge could order his acquittal at the end of the case of prosecution.

Section 84 of the Penal Code codifies the defence of unsoundness of mind, where a person is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law. Her Ladyship Zabariah Mohd Yusof FCJ explained the difference between "medical insanity" and "legal insanity". It was noted that "medical insanity" concerned a "disorder of the mind which covers a whole range of mental health conditions which may impair one's cognitive or emotional functions". Examples of such conditions are anxiety and depression.

However, it was observed that these conditions do not necessarily render one as legally insane under s. 84 of the Penal Code, so as to accord a complete defence in criminal law. In contrast, "legal insanity" was explained to involve "a distinct set of criteria and considerations within the framework of the legal system. It goes beyond mental health and pertains to one's legal capacity and responsibility for their actions. It also entails assessment by mental health experts and legal professionals to analyse and evaluate the

accused's mental state at the time of the alleged offence committed. It was noted that the consequences of legal insanity may result in the accused being declared not criminally responsible or being committed to a psychiatric institution instead of facing traditional criminal penalties.

The Federal Court then observed that a two-stage process would arise when the defence of insanity is raised. The *first stage* involves a determination of whether the accused was medically insane at the time when he committed the alleged offence. This is premised on the evidence of medical experts. The *second stage* involves an assessment of whether the accused, by reason of his psychiatric condition, has lost his cognitive faculties to a degree that he is incapable of knowing the nature of his act or that reason of his psychiatric condition, has lost his cognitive faculties to a degree that he is incapable of knowing the nature of his act or that what he is doing is wrong or contrary to law. The second stage requires a determination by the court based on the evidence adduced at trial.

The trial judge in the case had rejected the evidence of the medical consultant because of the delay in the consultant's examination of the accused, which took place nine (9) months after the incident and that the consultant had no immediate medical records of his condition from time of commission of crime. It was decided by the Federal Court that such delays by itself, do not invalidate the conclusions drawn by a medical professional. Moreover, the medical consultant SP9 was able to make reliable inferences based on medical records and other evidence. The need for expert medical evidence to substantiate the defence of insanity was emphasised. The evidence of SP 9 was before the court, which established the mental state of the accused at the time of the offence, that the accused was of sound mind at the material time.

The Federal Court then held that the Court of Appeal when affirming the decision of the High Court, had erred in electing not to follow the principle in *PP v. Lim Poo Teck* [2024] 1 MLJ 337 that acquittals should not occur prematurely based solely on medical testimony without hearing the defence. Legal insanity has to be proven by the defence before the defence of insanity under section 84 applies.

It was ultimately held that acquitting the accused before defence is called amounts to acquitting the accused before the defence of legal insanity under section 84 of the Penal Code is proven, which is an error of law.

The Federal Court had then allowed the appeal by Prosecution and remitted the case to the High Court for continued trial and for the accused to enter on his defence.

A *(In the present case, it was the SCJ who had ordered for the accused to be sent for medical assessment, pursuant to which the psychiatrist had prepared a report in the form of P4B confirming his mental condition at the time of commission of offence, but fit to stand trial. The trial then progressed, the accused had no legal representation. He did not cross-examine the witnesses for the prosecution but at the end of the case of prosecution had explained to the*
B *court that he was not aware what he was doing at the time of making communication in his twitter application, and he did not know what he did was contrary to the law. The SCJ had found that the prosecution had been unsuccessful in making out or proving a prima facie case, as there was no evidence on the intent of the accused to annoy others by making the posting, which is the mens rea element to be proven by the prosecution. Falling short*
C *of that, the SCJ decided that the prosecution had not proven a prima facie case for her to order the accused to enter on his defence to the preferred charges. Therefore, in the present case, the SCJ was mindful of both medical and legal insanity. She had accepted the evidence and report of the psychiatrist and had also appreciated the application of section 84 of the Penal Code, which codifies*
D *legal insanity. It was only after that, she had decided to acquit the accused person on the premise that the prosecution had not established a prima facie case and not because he had suffered unsoundness of mind at the time of commission of offence. Coupled with the lack of proof, the SCJ had embarked on an evaluation of the evidence tendered by the prosecution in its entirety, which includes the testimony of SP3, the medical expert who had expressed*
E *his medical opinion on the medical insanity of the accused which also syncs with the explanation offered by the accused at the close of the case of prosecution).* (emphasis added)

[13] The SCJ had embarked on the trial of the case correctly and in accordance with the law as discussed above. In fact, Ratanlal & Dhirajlal in
F *Law of Crimes, A Commentary on Indian Penal Code*, 1860, 29th edn, at p. 394 has this to say on the duty of the court when dealing with an accused who suffers unsoundness of mind – when a plea of insanity is set up by the accused, the burden of proof is on him to prove it. But a man, who is insane will not be able to defend himself properly and effectively. It is, therefore,
G the duty of the court to look after the defence of the accused in the light of the evidence on record. Finding and the decision made by the SCJ in the present case are also fortified by the decision of the Supreme Court of India in the case of *Bhikari* AIR 1966 SC 1, 3, where it is observed:

H Undoubtedly it is for the prosecution to prove beyond reasonable doubt that the accused had committed the offence with the requisite *mens rea*. Once that is done a presumption that the accused was sane can rebut it either by leading evidence or by relying upon the prosecution evidence itself. If upon the evidence adduced in the case whether by the prosecution or by the accused a reasonable doubt is created in the mind of the court as regards one or more of the ingredients of the offence,
I including *mens rea* of the accused he would be acquitted. This is very different from saying that the prosecution must also establish the sanity of the accused at the time of commission of the offence despite what has been expressly provided for in s. 105 of the Evidence Act.

[14] Following on, as the appeal by the accused is against the judgment by the SCJ who has found the accused not guilty, pursuant to s. 307(1) of the Criminal Procedure Code (CPC/Act 593), this court could only reverse the decision and judgment of the SCJ if it smacks on an error of fact or law or both. Briefly, there has to be an appealable error committed by the SCJ. Only then, this court would be able to exercise appellate intervention. If not, this court is left with no alternative but to restore the order of acquittal made in favour of the accused. It is so in the present case, as for the finding of not guilty, upon curial scrutiny of the evidence tendered in this case by the prosecution against the accused and the explanation advanced by the accused, I do not see any justification for this court to disturb the said finding of fact and law, as it is in tandem with the evidence proffered in the case and the law applicable to the facts, circumstances of the case and the offences committed by the accused, as per the preferred charges against him. Ensuing from the above, there is no apparent or compelling reason for this court to interfere with the findings arrived at and the decision made by the SCJ, as it is in accord with the circumstance of the case involving the accused and it syncs with the law applicable. Thus, it is not plainly wrong.

[15] As such, the order of acquittal and discharge of the accused is affirmed and the appeal by the prosecution is thus dismissed. It is recorded that the accused was not present in court for the decision, but his advocate was present. His presence was dispensed with by this court, as he was travelling from the north to attend the court session. Moreover, the decision made in this appeal does not in any way prejudice him, as it is an affirmation of the order of acquittal and discharge already made by the SCJ earlier.

Order of acquittal and discharge affirmed.